IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-90

DANIEL BURCH and WRESTLE, INC.,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Louisiana

BRIEF OF STATE OF LOUISIANA, RESPONDENT

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BRIEF OF STATE OF LOUISIANA, RESPONDENT

STATEMENT OF THE CASE

By bill of information the District Attorney of Orleans Parish jointly charged Wrestle, Inc. and Daniel W. Burch, in the first count, with possession, exhibition, and display of hard-core sexual conduct in an untitled motion picture shown in booth number 9 at 4059 Tulane Avenue, New Orleans, Louisiana, on May 24, 1977, and, in the second count, with possession, exhibition, and display of hard-core sexual conduct in a motion picture entitled "Black Bobbysoxer" on the same date. R. 1.

On September 27, 1977, Wrestle, Inc., and Daniel Burch were jointly tried before a jury of six persons, five of whom could render a verdict under Article 1, Section 17, of the Louisiana Constitution of 1974 and Louisiana Code of Criminal Procedure Article 779 as amended. That same day the six person jury by a vote of 5 to 1 found Daniel Burch guilty as charged on both counts, and by a unanimous vote found Wrestle, Inc., guilty as charged on both counts. R. 10-12. Daniel Burch was sentenced to two consecutive, suspended seven month terms in Parish Prison and Wrestle, Inc., was fined $600.00 on each count. R. 14, 17.

On November 15, 1977, Daniel Burch and Wrestle, Inc., filed a motion for appeal to the Louisiana Supreme Court. R. 24. While their appeal was pending there this Honorable Court on March 21, 1978, handed down its decision in *Ballew v. Georgia*, 435 U.S. 223, declaring unconstitutional under the Sixth and Fourteenth Amendments to the United State Constitution the Georgia law permitting trial by a five person jury, all of whom must concur in the verdict.

On their appeal before the Louisiana Supreme Court Daniel Burch and Wrestle, Inc., on May 16, 1978, filed a First Supplemental Brief in which they attacked the constitutionality of the Louisiana non-unanimous jury of six which had tried their case, citing as authority this Court's recent decision in *Ballew v. Georgia*, supra.

On June 19, 1978, the Louisiana Supreme Court addressed this federal question on its merits and decided

it adversely to Burch and Wrestle's position, citing as authority *Williams v. Florida*, 399 U.S. 78 (1970), and *Johnson v. Louisiana*, 406 U.S. 356 (1972). *State v. Wrestle, Inc.*, 360 So.2d 831 (La. 1978).

Daniel Burch and Wrestle, Inc., applied to this Court for a Writ of Certiorari, which was granted October 30, 1978.

ARGUMENT

I

Plea Of Mootness

The State of Louisiana respectfully reurges the contention it made in its Opposition To Certiorari herein that this matter is moot as far as Wrestle, Inc., is concerned because Wrestle was found guilty as charged by the trial jury of six by a unanimous vote on both counts, and this verdict is unassailable under *Williams v. Florida*, 399 U.S. 78 (1970). See R. 10-12.

II

The Five Out Of Six Verdict Is Constitutional

In the instant proceeding Daniel Burch and Wrestle, Inc., are charged with the crime of obscenity as defined by Article 106 of the Louisiana Criminal Code, La. R.S. 14:106, for which, at the time of the instant crime, the

punishment was a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment in the parish prison for not more than one year, or both.

Article 1, Section 17, of the Louisiana Constitution of 1974 pertinently provides that a case in which the punishment may be confinement without hard labor for more than six months shall be tried by a jury of six persons, five of whom must concur to render a verdict. Implementing this constitutional mandate, Article 779 of the Louisiana Code of Criminal Procedure states that a defendant charged with a misdemeanor in which the punishment may be a fine in excess of five hundred dollars or imprisonment for more than six months shall be tried by a jury of six, five of whom must concur to render a verdict.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court upheld the constitutionality under the Sixth and Fourteenth Amendments of a six person jury in a state criminal trial, pointing out that because the purpose of the jury trial is to prevent oppression by the Government, the essential feature of a jury lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence, and that the performance of this role is not less likely to be achieved when the jury numbers six instead of twelve. 399 U.S. at 100.

Although the opinion in *Williams* seemed to approve of the unanimity requirement of the Florida six person jury there involved, it intimated no view whether or not the requirement of unanimity was an indispensable element of the Sixth Amendment jury trial. See 399 U.S. at 100.

Two years later the issue of the constitutionality of non-unanimous jury verdicts in state criminal trials was squarely presented to this Court in *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), involving, respectively, Louisiana's 9 out of twelve and Oregon's 10 out of twelve jury verdicts. In *Johnson* and *Apodaca* this Court upheld the constitutionality of these state majority verdicts, concluding, pertinently, in *Apodaca*:

> "As we said in *Duncan*, the purpose of trial by jury is to prevent oppression by the Government by providing a 'safeguard against the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge.' *Duncan v. Louisiana*, 391 U.S., at 156. 'Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . .' *Williams v. Florida*, supra, at 100. *A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment.* As we said in *Williams*, a jury will come to such a

judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served." 406 U.S., at 410-411. (Emphasis added)

Mr. Justice Blackmun concurred in *Johnson v. Louisiana*, stating that the majority verdict system is not in his view constitutionally offensive when a substantial majority of the jury, such as the 75% that must concur in a 9-3 verdict, are to be convinced. 406 U.S., at 366; see also Hargrave, The Declaration Of Rights Of The Louisiana Constitution Of 1974, 35 La.L.Rev. 1, 56, n. 300 (1974) ("If 75 per cent concurrence (9/12) was enough for a verdict as determined in *Johnson v. Louisiana*, 406 U.S. 356 (1972), then requiring 83 per cent concurrence (5/6) ought to be within the permissible limits of *Johnson*.")

The following year, in *Colgrove v. Battin*, 413 U.S. 149 (1973), this Court upheld the six-person jury in civil cases, saying, pertinently:

> "We had no difficulty reaching the conclusion in *Williams* that a jury of six would guarantee an accused the trial by jury secured by Art. III and the Sixth Amendment. Significantly, our determination that there was 'no discernible difference between the results reached by the two different-sized juries,' 399 U.S., at 101, drew largely upon the results of studies of the operations of juries of six in civil cases. Since then, much has been written about the six-member jury, but nothing that persuades us to depart from the conclusion reached in *Williams*." 413 U.S., at 158-159 (footnotes omitted)

This Court's recent decision in *Ballew v. Georgia*, 435 U.S. 223 (1978), declaring Georgia's five member jury invalid under the Sixth and Fourteenth Amendments, in no way affects the principles laid down in *Williams v. Florida** that a six member jury is "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." 399 U.S., at 100. These essential features,

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* In *Ballew* Mr. Justice Blackmun said, ". . . we adhere to, and reaffirm our holding in *Williams v. Florida* . . . ." *Ballew v. Georgia*, 435 U.S., at 239.

which this Court determined in *Ballew* did not exist in a five person jury, are in no way changed, diminished, or altered because the six member jury can render a verdict of guilt or innocence by a vote of five of its members instead of the entire six. This verdict of five out of 6 takes place after group deliberation by a body of individuals empaneled in a fashion approved by this Court in *Williams*. As this Court held in *Apodaca*, a requirement of unanimity does not materially contribute to the exercise of the commonsense judgment of the group of laymen who comprise a jury. 406 U.S., at 410.

Justice Tate, in his opinion in the Louisiana Supreme Court in this case upholding the constitutionality of Louisiana's five out of 6 jury verdict, concluded:

> "The six-person jury will still presumably engage in the longer deliberations involving more communication that the court found adequately enhances greater verdict reliability and better community representation, despite (see *Johnson*) the elimination of the requirement for unanamity in verdict." *State v. Wrestle, Inc.*, 360 So.2d 831 (1978), at 838.

REBUTTAL

In brief to this Court petitioners contend that the decision of the Louisiana Supreme Court in this case upholding the validity of the Louisiana six person non-unanimous jury is erroneous "because such a jury sub-

stantially endangers the constitutional requisites for juries set forth in *Williams v. Florida*, 399 U.S. 78 (1970) and *Ballew v. Georgia*, 435 U.S. 223 (1978)." P. 5. In support of this argument petitioners rely on empirical data referred to in Mr. Justice Blackmun's opinion announcing the judgment of the Court in *Ballew v. Georgia*, which struck down as too small a unanimous Georgia jury of five.

Petitioners' contention overlooks the fact that Mr. Justice Blackmun's opinion in *Ballew* specifically and explicitly reaffirmed this Court's holding in *Williams v. Florida* that a jury composed of six members, such as the Louisiana jury here at issue, is sufficiently large to promote adequate group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. Furthermore, petitioners' theory that because five of the 6 members of the Louisiana jury which tried them could return a verdict of guilt or innocence (and did in Daniel Burch's case) the dissenting juror's voice is nullified, was rejected by this Court in *Johnson v. Louisiana*, in which this Court said pertinently:

> "We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On

the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have presuasive effect or to serve any other purpose — when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision as being, at least in their minds, beyond a reasonable doubt. Indeed, at this point, a 'dissenting juror should consider whether his doubt was a reasonable one . . . (when it made) no impression upon the minds of so many men, equally honest, equally intelligent with himself.' *Allen v. United States,* 164 U.S. 492, 501 (1896). Appellant offers no evidence that majority jurors simply ignore the reasonable doubts of their colleagues or otherwise act irresponsibly in casting their votes in favor of conviction, and before we alter our own long-standing perceptions about jury behavior and overturn a considered legislative judgment that unanimity is not essential to reasoned jury verdicts, we must have some basis for doing so other than unsupported assumptions." 406 U.S., at 361-362.

In the instant case the jury of six deliberated for approximately 50 minutes (from 5:35 to 6:24 p.m., R. 12) before returning a verdict of 6-0 against Wrestle, Inc., on both counts, and a verdict of 5-1 against Daniel Burch on both counts, R. 12. It is thus unrealistic to argue that the thoughts and opinion of the lone juror who did not join in the guilty verdict against Daniel Burch were ignored and disregarded by his fellow members.

In regard to petitioners' reliance on empirical data in support of their position, there is equally strong empirical data which militate against it. As Mr. Justice Brennan pointed out in his opinion for the Court in *Colgrove v. Battin,* supra, opinion is sharply divided among law review and other commentators concerning the effectiveness of the six-member jury. 413 U.S., at 159-160, n. 15. In general, although the division is not an absoiute one, the jury studies which are based on information resulting from observation of actual criminal court proceedings — "real life", that is, — tend to approve of the smaller jury and the majority verdict, whereas those grounded on deductive modeling, mock juries, etc., are critical of the six-member group and the non-unanimous verdict. See, among others, Nagel & Neef, Deductive Modeling To Determine An Optimum Jury Size And Fraction Required To Convict, 1975 Wash.U.L.Q. 933; Saks, Ignorance Of Science Is No Excuse, 10 Trial 18 (Nov. - Dec. 1974); Thompson, Six Will Do, 10 Trial 12 (Nov. - Dec. 1974); Zeisel, Twelve Is Just, 10 Trial 13 (Nov. - Dec. 1974); Zeisel & Diamond, "Convincing Empirical Evidence" On The Six Member Jury, 41 U.Chi.L.Rev. 281 (1974); Note, The

Effect Of Jury Size On The Probability Of Conviction: An Evaluation Of *Williams v. Florida*, 22 Case W.Res.L.Rev. 529 (1971); Lempert, Uncovering "Nondiscernible" Differences: Empirical Research And The Jury-Size Cases, 73 Mich.L.Rev. 644 (1975); Bogue & Frik, The Six Man Jury, 17 S.D.L.Rev. 285 (1972); Pabst, Statistical Studies Of The Cost Of Six-Man Versus Twelve-Man Juries, 14 Wm. & Mary L.Rev. 326 (1972); Berman & Coppock, Outcomes Of Six- and Twelve-Member Jury Trials: An Analysis Of 128 Civil Cases In The State Of Washington, 48 Wash.L.Rev. 593 (1973); Wiehl, The Six Man Jury, 4 Gonz.L.Rev. 35 (1968); Comment, Defendant's Right To A Jury Trial - Is Six Enough?, 59 Ky.L.J. 996 (1971); Devitt, The Six Man Jury In Federal Court, 53 F.R.D. 273 (1971); Powell, Reducing The Size Of Juries, 5 U.Mich.J.L. Reform 87 (1971); Mills, Six-Member And Twelve-Member Juries: An Empirical Study Of Trial Results, 6 U.Mich.J.L. Reform 671 (1973); Kessler, An Empirical Study Of Six- And Twelve-Member Jury Decision-Making Processes, 6 U.Mich.J.L.Reform 712 (1973); Croake, Memorandum On The Advisability And Constitutionality Of Six Man Juries And 5/6 Verdicts In Civil Cases, 44 N.Y. State B.J. 385 (1972).

There is no evidence that jury deliberation requires more than six people, or that six individuals cannot effectively carry out the decision-making process. In fact, some studies support the view that discussion is stimulated and made more open by reducing the size of

the group, since group members are less likely to consider the other members as an audience when they participate with fewer people, whereas in larger groups shy or tense persons tend to avoid discussion. See Wiehl, The Six Man Jury, 4 Gonz.L.Rev. 35, 39 (1968); Berman & Coppock, Outcomes Of Six- And Twelve-Member Jury Trials: An Analysis Of 128 Civil Cases In The State Of Washington, 48 Wash.L.Rev. 593, 596 (1973); Powell, Reducing The Size Of Juries, 5 U.Mich. J.L. Reform 87, 102-103 (1971).

Further, as this Court stated in *Johnson v. Louisiana*, there is no evidence that majority jurors ignore the reasonable doubts of their colleagues or otherwise act irresponsibly in casting their votes in favor of conviction. 406 U.S., at 362. And The Honorable Lloyd L. Wiehl, Judge of the Superior Court of Yakima County, Washington, has suggested that ". . . five out of six should be able to reach a verdict with as much give-and-take as ten out of twelve." 4 Gonz.L.Rev., at 39 (1968).

THE STATE INTEREST

It is well known that if allowed to deliberate long enough a jury reaches a unanimous verdict in approximately 95 percent of all cases, and that in approximately 5 percent of all unanimous verdict cases the jury hangs. See Nagel & Neef, Deductive Modeling To Determine An Optimum Jury Size And Fraction Required To Convict, 1975 Wash.U.L.Q. 933, 934; Kalven & Zeisel, The American Jury, 56-58, 461 (1966).

Although the majority jury vote actually affects the type of verdict ultimately arrived at in only a small fraction of the cases tried in this manner, the system saves considerable time in all proceedings in which it is used because the jury returns to the courtroom with its verdict as soon as five of its members agree either to convict or acquit, and the number of hung juries declines.

One of the advantages of federalism is that it permits different jurisdictions to function in diverse ways. This diversity should be fostered and encouraged for the health and resiliency of our society. Further, the courts all over this country, both criminal and civil, are becoming more overworked with each passing year. Louisiana thus has a valid interest in maintaining its 5 out of six jury verdict, not only because of the time this procedure saves everyone connected with the criminal justice process, but also, on the ground of comity, for the reason that Louisiana's distinctive jury system, a product of its Latin heritage, should be maintained, and not be sacrificed to conformity, without strong proof, based on a long-term study of the workings of the Louisiana criminal district courts, that this procedure produces unjust results.

CONCLUSION

The State of Louisiana believes that its six member jury, five of whom can return a verdict, is constitutional under *Williams v. Florida* and *Johnson v. Louisiana*, and respectfully asks this Honorable Court to affirm the judgment of the Supreme Court of

Louisiana in this case holding that the Louisiana law which permits conviction by a non-unanimous six person jury is valid under the Sixth and Fourteenth Amendments to the United States Constitution.

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